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September 25, 1997

VIA COURIER

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92-260

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Telecommunications Services Inside Wiring: Customer Premises Equipment - In the Matter of Implementation of Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring

Dear Mr. Caton:

Enclosed for filing please find an original and nine (9) copies of the Comments of RCN Telecom Services, Inc. in the above reference matter. Also included is a 3.5 inch diskette of RCN Telecom Services, Inc. Comments in WordPerfect 5.1 format.

If you have any questions concerning this filing, please do not hesitate to contact the undersigned.

Respectfully submitted,

Jean L. Kiddoo
Rachel D. Flam

Its Counsel

Enclosures

cc: Meredith Jones - Cable Services Bureau
Roy J. Stewart - Mass Media Bureau
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DOCKET FILE COPY ORIGINAL

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20054

In the Matter of	)	
	)	
Telecommunications Services	)	
Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-260
and Competition Act of 1992:	)	
	)	
Cable Home Wiring	)	

COMMENTS OF
RCN TELECOM SERVICES, INC.

Jean L. Kiddoo
Rachel D. Flam

SWIDLER & BERLIN, CHARTERED
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(202) 424-7834

Counsel for RCN Telecom Services, Inc.

Dated: September 25, 1997

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SUMMARY

RCN Telecom Services, Inc. ("RCN"), through subsidiaries, is a facilities-based provider of local and long-distance telephone, video and Internet access to the residential markets. Access to multiple dwelling units ("MDU") is critical to RCN's ability to compete. Accordingly, RCN has a significant interest in the outcome of this proceeding insofar as it will apply important protections to assure that no incumbent MVPD will be able to block competitive choice for consumers in MDUs.

RCN supports the Commission's proposal that physically inaccessible demarcation points be moved but urges the Commission to clarify that the new demarcation point must be made accessible by moving it *away* from the unit and toward the feeder cables to the point where it is reasonably accessible to multiple MVPDs -- typically at the junction box. A demarcation point should be deemed "physically inaccessible" where it cannot be reached without cutting or otherwise altering any part of the building, molding or conduit. Demarcation points should also be considered physically inaccessible where they can be reached by only one molding or conduit, the molding or conduit is full or otherwise unavailable, and the MDU owner has determined that a second set of installations is infeasible. RCN believes that the Commission has the authority to move the demarcation point under Section 641(i) as well as Sections 4(i) and 303(r).

RCN supports the proposal to permit alternative providers to install wiring within existing conduits or moldings where space exists even over the incumbent providers objection. Although such a rule would not effect a taking requiring just compensation, RCN believes that the Commission may want to consider requiring some reasonable compensation. RCN proposes that parties be required to negotiate compensation in the first instance, but that, in the absence of an agreement, a Depreciated Installation Cost formula be utilized to determine each party's fair share of the space. Also toward the end of ensuring access to moldings and conduits, RCN urges the Commission to clarify that no state mandatory access statute provides authority for an

incumbent to block moldings or conduits with unused wiring. Such a declaration would not be a preemption of state law since state mandatory access laws are not inconsistent with this policy.

RCN proposes the following additional modifications to the Commission's proposals:

- An incumbent disputing ownership rights must pursue its legal remedies within 30 days of notice of termination or, upon expiration of the notice period, be subject to a forfeiture
- Time limits for notice and the incumbent's election should be shortened.
- Parties should be free to negotiate the price of home run wiring; indeed, RCN discourages the Commission from setting forth any formula to determine a "reasonable" price.
- The Commission should levy a penalty of up to $25,000 per day for violation of its inside wiring rules.
- The Commission should require a seamless transition of service and further prohibit an incumbent from removing or disabling any equipment until the earlier of the date upon which the alternative provider is ready to initiate service, 30 days after the incumbent elects to abandon wiring or 30 days after the incumbent elects to remove wiring.
- Where an incumbent elects to remove wiring, a performance bond should be required.
- The Commission should require video providers to transfer to the MDU owner, upon installation, ownership of home wiring and home run wiring (but only at the owner's election); the same rule should apply to molding and conduit installations.
- RCN discourages the Commission from permitting the terms of bulk service agreements to override the Commission's rules.

Finally, RCN agrees that the Commission can and must apply its inside wiring rules to all MVPDs. RCN also supports the Commission's proposal that the home run wiring rules be triggered by a subscriber's request for termination.

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In the Matter of	)	
	)	
Telecommunications Services	)	
Inside Wiring	)	CS Docket No. 95-184
	)	
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In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-260
and Competition Act of 1992:	)	
	)	
Cable Home Wiring	)	

COMMENTS OF
RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, hereby submits these Comments to the Further Notice of Proposed Rule Making in the above captioned proceedings.[1]

I. INTRODUCTION

RCN, through subsidiaries in Boston, New York, Pennsylvania and, in the near future, Washington, D.C., is a facilities-based provider of video, local and long distance telephone and Internet access services, primarily to residential consumers. The ability to provide service to multiple dwelling unit buildings ("MDUs") is a critical component of RCN's ability to enter these markets to compete with incumbent service providers. RCN therefore supports the Commission's efforts to remove longstanding roadblocks to competition in MDUs which have

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[1] *In the Matter of Telecommunications Service Inside Wiring: Customer Premises Equipment*, CS Docket No. 95-184; *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, Further Notice of Proposed Rulemaking ("Further Notice" or "FNPRM").

resulted from the physical inaccessibility to competitive providers like RCN of subscriber premises in MDUs. RCN has a substantial interest in this proceeding and submits these comments in support of the steps taken by the Commission in its Further Notice and to suggest certain refinements and clarifications to those proposed rules which would further assure that wiring issues do not serve as a barrier to entry for competitive multichannel video programming distributors ("MVPDs") seeking to provide video services to consumers in MDUs.

II. THE DEMARCATION POINT MUST BE ACCESSIBLE TO ALL MVPDS

A. The Commission Should Require "Physically Inaccessible" Demarcation Points to be Moved to the Junction Box

RCN supports the Commission's proposal to require that physically inaccessible demarcation points be moved so that they become accessible to all MVPDs.[2] The Commission is correct that, particularly in older MDUs, existing demarcation points may be embedded in walls or conduits making them inaccessible to new competitors and creating absolute roadblocks to competition in MDUs absent the type of modification proposed by the Further Notice. It is apparent that, in order to have any meaningful effect, the Commission's proposal to move a physically inaccessible demarcation point "*back* to the point at which it first becomes physically accessible" means that the demarcation point should be moved *toward* the feeder cables, and not further away, rendering it even more inaccessible to would-be competitors.

While this clarification seems to belabor the obvious, the Commission's proposed rule would require a physically inaccessible demarcation point to be moved to a point "as close as practical [to the point at or about twelve inches outside of where the cable wire enters the subscriber's dwelling unit] so as to permit access to the cable home wiring." Although plainly contrary to the Commission's clear intention to make inside cable wiring accessible to competitors, this language might be interpreted by incumbent providers seeking to thwart

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[2] FNPRM at ¶ 84.

competition as permission simply to move the demarcation point the minimum distance possible, which could lead to the demarcation point being placed at the wall plate inside the unit, and further from the feeder cable.[3] Such a construction would plainly thwart the Commission's purpose for moving the demarcation point in the first place -- to minimize disruption to the subscriber's home and the building common areas -- since a demarcation point which is physically inaccessible 12 inches *outside* the unit is almost certainly equally (or even more) inaccessible *inside* the unit without similar disruption and construction.

Accordingly, the Commission should make clear that the new demarcation point must be made accessible by moving it away from the unit and toward the feeder cables to the point where multiple MVPDs can have reasonable access to the cable home wiring -- typically at the junction box. At that new demarcation point, the incumbent should be required, just as in the case of other home run wiring, to leave the demarcation point "accessible for the new provider."[4]

B. "Physically Inaccessible" Means That the Demarcation Point Cannot be Reached Without Damage to the Building, Molding or Conduit or That Only One Molding or Conduit Can Feasibly be Installed in an MDU and Such Molding or Conduit is Not Accessible to All MVPDs

The Commission should define as "physically inaccessible" any demarcation point to which an alternative provider cannot connect its wiring (including any home run wiring acquired by operation of the Commission's proposed rules) without cutting or otherwise altering any part of the building including the molding or conduit itself. Under this definition, a demarcation point encased within a closed metal conduit or buried inside a wall or floor would clearly be "physically inaccessible, " since the conduit, wall or floor would need to be cut or altered to connect a home run wire to the demarcation point. Likewise, although hallway molding is

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[3] Indeed, Time Warner has already taken the position in a New York state proceeding that moving the demarcation point "back" means to the wall plate. *See Time Warner Cable of New York City v. Board of Managers of the Dorcester Condominium*, Supreme Court of the State of New York, Index No. 109157/96.

[4] *See* FNPRM at ¶ 41.

generally designed for ease in opening and closing which makes it accessible to multiple MVPDs, to the extent that it has not been designed and/or installed in such a manner, it too would render the demarcation point "physically inaccessible."[5]

The Commission should also recognize that a demarcation point is inaccessible when it can be reached by only one molding or conduit and that molding or conduit is full or otherwise not available to multiple MVPDs. As the Commission has noted, building owners often object to duplicative molding and conduit installations for important and valid reasons including aesthetics, space limitations, the avoidance of disruption and inconvenience, and the potential for property damage.[6] Under such circumstances, if an alternative provider is unable to access the conduit or molding already in place, it will be unable to reach the demarcation point in order to compete for subscribers in that building.

In these cases, the demarcation point is just as inaccessible as it would be if buried in concrete. Unless the Commission's rules reflect this reality and require that the demarcation be moved back to an accessible place under such circumstances, incumbent providers will continue to be able to stymie any competitive access to tenants by blocking a competitor's use of the existing conduit or molding with unused home run wiring or by claiming an exclusive right to use the conduit or molding.[7] Accordingly, RCN recommends that the Commission adopt a rule that a demarcation point is "physically inaccessible" where an existing conduit and/or molding is full or otherwise unavailable to an alternative provider and the MDU owner has made a

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[5] RCN notes that the Commission specifically excluded hallway moldings from its list of potentially physically accessible locations. FNPRM at ¶ 84. As stated above, RCN believes that there are circumstances under which a demarcation point located within a hallway molding might also be physically inaccessible.

[6] FNPRM at ¶ 25.

[7] As discussed in Section IIIB, *infra*, a common argument made to support such anti-competitive behavior is that state mandatory access laws afford such a right. As developed in that Section, RCN urges the Commission to clarify that such laws provide no basis for such behavior.

reasonable good faith determination, based upon criteria including space constraints, aesthetics and/or the possibility of property damage, that an additional conduit or set of moldings cannot be installed.

C. The Commission Has the Authority to Require that a Physically Inaccessible Demarcation Point be Moved

The Commission has the authority, under Section 624(i) of the Communications Act, to require that a physically inaccessible demarcation point be moved to a place where it can be reached by multiple providers. Section 624(i) requires the Commission to "prescribe rules concerning the disposition . . . of any cable installed . . . within the premises of [a] subscriber."[8] As the Commission itself has acknowledged, the goal of Congress in enacting this provision was to "promot[e] consumer choice and competition by permitting subscribers to use their existing home wiring to receive an alternative video programming service."[9]

While espousing this clear purpose, Congress left it to the Commission to determine the method by which to implement this mandate including the details of how to define cable home wiring for purposes of promoting consumer choice and competition. In 1993, the Commission interpreted this statute as permitting it to establish a specific demarcation point and, indeed, to set that point "at (or about) twelve inches *outside* of where the cable wire enters the outside wall of the subscriber's individual dwelling unit."[10] In setting the demarcation point where it did, the

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[8] 47 U.S.C. § 541(i).

[9] FNPRM at ¶ 63. *See also* Senate Report No. 102-92 ("The FCC permits consumers to remove, replace, rearrange, or maintain telephone wiring inside the home even though it might be owned by the telephone company. The Committee thinks that this is a good policy and should be applied to cable. For cable, however, the FCC should extend its policy to permit ownership of the cable wiring by the homeowner."); House Report No. 102-628 ("Allowing consumers who terminate service to purchase the home wiring] would enable consumers to utilize the wiring with an alternative multichannel video delivery system and avoid any disruption the removal of such wiring may cause.").

[10] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Report and Order, MM Docket No. 92-260 at ¶

Commission reasoned that "[t]his should give alternative providers access to the cable home wiring so that they may connect the wiring to their systems without disrupting the subscriber's premises."[11]

The Commission was correct in concluding, in 1993, that it had the authority, under Section 624(i), to establish a demarcation point and to define it as it did. The extensive record in these subsequent proceedings, however, demonstrates conclusively that the previously established demarcation point may be physically inaccessible to alternative providers in many MDUs, thereby stifling competition in these locations. Accordingly, and for the same reasons that it made its initial judgement in 1993 to extend the demarcation point to 12 inches outside the individual units in MDUs in order to foster the competitive use of cable home wiring and minimize duplicative construction and disruption, the Commission can -- and indeed must -- amend its earlier decision to require that the demarcation point be moved in certain limited and clearly defined circumstances where the intent of Congress is impeded by the current definition. Such a revision of its policies by the Commission is clearly within the scope of the authority vested in it by Congress, and indeed is critical to the effectuation of the goals underlying Section 624(i).[12]

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12 (Rel. Feb. 2, 1993) (emphasis added).

[11] *Id.* at ¶¶ 11-12.

[12] The courts will defer to the Commission's rational construction of the statute and its amendment of the demarcation point under the authority therein. *See Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (where the statute is silent or ambiguous on the specific issue, the question for the courts is whether the agency's construction was permissible; upholding EPA's construction of statute); *Strickland v. Maine Department of Human Services*, 48 F.3d 12 (1st Cir. 1995) (applying *Chevron* analysis; upholding U.S. Secretary of Agriculture's construction of statute). *See also Holly Farms Corporation v. National Labor Relations Board*, 116 S.Ct. 1396, 1401 (1996) ("Where the legislative prescription is not free from ambiguity, the administrator must choose between conflicting reasonable interpretations. Courts, in turn, must respect the judgement of the agency. . . ."). Where the aim of the Commission in amending its rules so clearly comports with the intent of Congress such a construction must surely be held to be rational.

Even if the Commission does not have the authority under Section 624(i) -- which it does -- Sections 4(i) and 303(r) of the Communications Act also afford the Commission the authority to require that a physically inaccessible demarcation point be moved. As the Commission itself noted, "Section 4(i)[, which authorizes it to 'perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions'] has been held to justify various Commission regulations not within explicit grants of authority."[13] Section 303(r), furthermore, provides the Commission with the authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ." RCN agrees with the Commission's conclusions, in reliance upon these provisions, that it has the authority to establish procedures regarding the disposition of home run wiring[14] and to apply its disposition rules to all MVPDs.[15] For the very same reasons that the Commission reached its conclusion, RCN urges that the Commission has authority here to require that demarcation points be moved where physically inaccessible. Specifically, the Commission has been charged by Congress through various statutes, including Section 624(i), with the responsibility of promoting competition and consumer interests.[16] Given the pervasiveness of the problem of physically inaccessible demarcation points in MDUs, promulgation of the rule suggested herein is *absolutely* necessary to the Commission's ability to carry out this important mandate. Nothing in the Act precludes the Commission from doing so.

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13 FNPRM at ¶ 55 (*quoting* 47 U.S.C. § 154(i)).

14 FNPRM at ¶¶ 54-69.

15 FNPRM at ¶¶ 68, 74.

16 *See e.g.*, 47 U.S.C. § 151; 47 U.S.C. § 521(6); 47 U.S.C. § 543(a); 47 U.S.C. § 543(b); 47 U.S.C. § 543(c); 47 U.S.C. § 552(b).

III. ALTERNATIVE PROVIDERS MUST BE AFFORDED ACCESS TO UNUSED SPACE WITHIN A CONDUIT OR MOLDING

A. Where Space Exists, an Alternative Provider Should Be Permitted to Install Its Wiring Within Existing Moldings or Conduits

RCN supports the Commission's proposal to permit alternative service providers to install wiring within an existing molding or conduit where room exists therein and the building owner does not object.[17] As noted above, in many instances, an alternative provider's ability to compete for subscribers within a building turns on its ability to obtain access to the existing molding or conduit. Accordingly, the rule is critical to the future of competition in MDUs.

RCN agrees with the Commission's tentative conclusion that no unconstitutional taking would be raised by adoption of the proposed rule.[18] To begin with, absent an explicit lease or other property interest conveyed by the owner of the premises, no service provider has an inherent right to any space within a building, including space under or within moldings or inside conduits. It is a fundamental principle of property law that all empty space within a building belongs, in the first instance, to the building owner.[19] RCN is unaware of any statute or regulation which would convey a right to an incumbent cable provider or other MVPD to exclude others from empty space inside of a molding or conduit solely because the molding or conduit may have been installed by, or even owned by, the owner. An incumbent's ability, if any, to exclude another entity from using the empty space within a building could, therefore, only derive from an express contract with the building owner.

Thus, in the absence of an express exclusive agreement or conveyance, there is simply no "property" interest held by the incumbent for purposes of the Fifth Amendment prohibition on

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17 FNPRM at ¶ 83.

18 FNPRM at ¶ 83.

19 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

the taking of property. Given that the Commission's proposal expressly presupposes the MDU owner's consent to the use of the space within the molding by an alternative provider (which would presumably not be given if the owner was bound by an exclusive agreement to lease or otherwise convey that space to the incumbent provider), the proposed rule will not interfere with contractual rights. Finally, since the proposal only applies where there *is* space available in the conduit or molding, there will be no "taking" of the incumbent's property by displacing or removing its wires.

Although there is no "taking", and compensation is therefore not constitutionally required, RCN believes that, in recognition and consideration of the initial investment made by the incumbent, the Commission may want to consider requiring that reasonable compensation be afforded to the incumbent for access to the empty space within a conduit or molding installed by the incumbent. RCN proposes that such compensation be determined, in the first instance, by negotiation. If the parties are unable to reach an agreement, however, RCN proposes that a "Depreciated Installation Cost" formula be utilized to determine each party's fair share of the space. Under this proposed formula, the cost for each wire would be determined by calculating the incumbent's documented installation costs for molding or conduit less depreciation. The new provider's share of the costs would be the depreciated per wire cost times the number of wires it has installed in the conduit or molding .

B. The Commission Should Make Clear that State Mandatory Access Statutes Do Not Authorize Blocking Moldings or Conduits with Unused Wiring

As the Commission is aware, certain states have adopted mandatory access rules which require MDU property owners to permit franchised cable television operators to install wiring on their premises in order to reach their cable television subscribers. While these mandatory access rules were originally designed to ensure that subscribers would have access to additional services, cable franchisees have in the past attempted to use these mandatory access rules in order to exclude competition. The Commission has proposed to foreclose this anti-competitive

effort by stating that, "if a state mandatory access statute only gives a provider access rights to an MDU if a resident requests service, once the resident no longer requests that provider's service, the provider's right to maintain home run wiring dedicated to that subscriber would be extinguished."[20]

While RCN commends the Commission for this effort to preclude incumbents from using access statutes as a shield against competition, RCN respectfully submits that the Commission's formulation may have inadvertently left open an opportunity for incumbents in certain states such as New York, New Jersey, and Washington, D.C., to claim that, since the access statutes in those jurisdictions are not expressly predicated on the request of a subscriber for service, they have the right to maintain unused home run wiring in moldings or conduits even though such wiring is blocking competitive access. The threat of legal action on the basis of such statutes has been used time and again to intimidate building owners and discourage competition.[21] As the Commission itself has recognized litigation threats can, indeed, "chill the competitive

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[20] FNPRM at ¶ 39 n. 100.

[21] The only court actions known to RCN specifically addressing the cable company's right to block moldings/conduits with unused cable under a mandatory access statute were filed in New York state court by Time Warner. One case, *Paragon Cable Manhattan v. P & S 95th Street Associates and Milstein Properties Corp.*, Supreme Court of the State of New York, Index No. 130734/93 was settled after the Notice was issued. The settlement provides that Time Warner and RCN will share the use of the cable inside the conduits and leave their respective lock boxes unlocked so cable home wiring can be readily switched at the lock boxes. In another case, the Court is awaiting the outcome of this proceeding before rendering a decision. *See Time Warner Cable of New York City v. Board of Managers of the Dorchester Condominium*, Supreme Court of the State of New York, New York County, Index No. 109157/96. The remaining cases have not proceeded beyond the initial pleadings stage. In those remaining cases, Time Warner is claiming millions of dollars in damages for RCN's use or removal of cable from moldings/conduits owned by the owner. *See 10 West 66th Street Corporation v. Manhattan Cable Television, Inc.*, Supreme Court of the State of New York, New York County, Index No. 10407/92; *Manhattan Cable Television v. 35 Park Avenue Corp., WPG Residential Inc. and Williamson, Picket, Gross, Inc.*, Supreme Court of the State of New York, New York County, Index No. 23339/92.

environment."[22] The Commission can and should put an end to the use of such anti-competitive tactics.[23]

By providing that a cable operator cannot block conduits or moldings with unused cable the Commission would not be preempting state law since state mandatory access laws are not inconsistent with such a federal policy.[24] *First,* as the Commission has itself noted, a number of state mandatory access laws are expressly premised upon subscribers' request for service.[25] Clearly, unused wires are not needed for that purpose. *Second,* whether expressly predicated on tenants' requests for service or not, a construction of a state mandatory access law that would permit cable operators to block conduits and/or moldings with unused wiring would clearly contravene a central purpose underlying many, if not all, of these statutes' enactment -- to promote residents' access to efficient, economical service.[26] As the Commission has itself noted, competition is a preferred method of ensuring the achievement of such important goals.[27] *Third,* a number of state mandatory access laws require that installations be made in a manner that does

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[22] FNPRM at ¶ 31.

[23] If, after notice of the proposed installation of facilities and services in an MDU by an alternative provider, an incumbent claims a right, under a mandatory access statute, to maintain unused wires in a mandatory access building which block access to tenants by alternative providers, it should be required by the Commission to initiate prompt legal action. With such a requirement, cable operators will no longer be able to use the threat of litigation to deter competition, since a ruling one way or another will have been received after the first such instance. *See* Section IV, *infra.*

[24] *See City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulation or frustrates the purposes thereof.").

[25] FNPRM at ¶ 39 n. 100. *See e.g.,* C.G.S.A. § 16-333a (Connecticut for already constructed buildings); 55 ILCS § 5/5-1096(a) (Illinois); 68 P.S. § 250.503-B (Pennsylvania).

[26] *See e.g.,* D.C. Code § 43-1801 (District of Columbia); N.J.S.A. § 48:5A-2 (New Jersey); N.Y. Public Service Law § 211 (New York); M.S.A. § 238.23(2) (Minnesota).

[27] FNPRM at ¶ 60.

not interfere with the convenience of non-subscribing tenants;[28] many more permit a building owner to make such a requirement a condition of otherwise mandatory access.[29] Clearly, the convenience of a non-subscribing tenant is hindered when unused wiring is left in a molding or conduit so as to block the access of competitive providers and effectively prevent such tenants from engaging competitive service.

IV. AN INCUMBENT DISPUTING OWNERSHIP RIGHTS SHOULD BE REQUIRED TO PURSUE LEGAL REMEDIES WITHIN THIRTY DAYS

RCN urges the Commission to adopt a rule that an incumbent claiming the right to retain control over wires, molding or conduits after termination of service or otherwise claiming any right to exclude an alternative provider is required to obtain a court order that it has the right to retain control of the facilities, either final or *pendente lite*, within thirty (30) days of receiving notice that either its access to the entire building will be terminated or that the MDU owner is permitting competition. As the Commission has itself recognized, too often incumbents use threats of litigation as a weapon to squelch competition.[30] Under this proposal, the courts will quickly decide whether there is merit to an incumbent's claim, and any uncertainty will be removed for that and future disputes.

The rule should provide further that if the incumbent does not timely obtain such a court order, then at the expiration of the relevant notice period, the Commission will impose a forfeiture for each day past the end of the notic period until such time as an order is obtained. Moreover, in order to protect consumers during such period, the Commission should require that the incumbent continue to provide service to the subscribers. This component of the rule will serve the purpose of protecting consumers by ensuring them access to uninterrupted service and

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[28] *See e.g.*, M.S.A. § 238.24(1) (Minnesota).

[29] *See e.g.*, N.Y. Public Service Law § 228 (New York); DC Code § 43-1844.1 (District of Columbia).

[30] FNPRM at ¶ 31.

protecting their right to choice of providers.

V. THE TIME LIMITS FOR NOTICE AND THE INCUMBENT'S RESPONSE SHOULD BE SHORTENED

RCN joins the Independent Cable & Telecommunications Association ("ICTA") in requesting that the time limits for notice of the alternative provider's access to the building and the incumbent's response be shortened.

VI. THE PARTIES SHOULD NEGOTIATE THE PRICE FOR HOME RUN WIRING

RCN supports the Commission's proposals that parties be permitted to negotiate the price of home run wiring.[31] Each party has a substantial financial interest in reaching an agreement. The incumbent provider faces the prospect of having to remove its wiring and restore the premises to their original condition with all of the expense that this entails while the alternative provider faces the prospect of having to install all new facilities -- a costly and time-consuming endeavor. These realities should serve as a check on any temptation on the part of either side to act unreasonably. Accordingly, RCN would not advocate that the Commission set forth any formula to determine a "reasonable" price. RCN believes that any such formula would be viewed by the parties as a "fall back" price, and will therefore skew negotiations and hinder the ability of market forces to take their course for the benefit of the consumer.

VII. THE COMMISSION SHOULD LEVY PENALTIES FOR VIOLATIONS OF THE RULES

RCN strongly urges the Commission to adopt penalties for violations of its cable inside wiring rules, including penalties for an incumbent's failure to adhere to its initial election as to the abandonment or removal of wiring.[32] As the Commission has recognized, conduct such as an incumbent's failure to adhere to its initial election to remove home wiring, could put an

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31 FNPRM at ¶¶ 37, 40.

32 FNPRM at ¶ 36.

alternative provider at a substantial disadvantage.[33] RCN therefore supports a penalty of up to $25,000 per day for continuing violations of these important rules. A penalty of this magnitude should effectively deter violations.

VIII. THE COMMISSION SHOULD REQUIRE A SEAMLESS TRANSITION OF SERVICE

RCN supports the Commission's proposal to adopt a rule requiring parties to ensure a seamless transition of service from one provider to another[34] and, indeed, would further urge the Commission to require that, notwithstanding the time limits set forth in its rules, an incumbent not be permitted to remove or disable any equipment until the earlier of the date upon which the alternative provider is ready to initiate service or 30 days after the incumbent elects to abandon wiring, or 30 days after the incumbent elects to remove wiring.

The Commission has stated that one of its goals in proposing its rules was to "promote competition and consumer choice by minimizing any potential disruption in service to a subscriber switching video service providers." RCN believes that its proposal would help to effectuate that goal inasmuch as it will remove any temptation that an incumbent may have to threaten to remove wiring "in accordance with the rules" even though the alternative provider has not been afforded reasonable notice of that election and an opportunity to install replacement wire.

IX. A PERFORMANCE BOND SHOULD BE REQUIRED WHERE THE INCUMBENT ELECTS TO REMOVE WIRING

The Commission should require that incumbents electing to remove wiring post performance bonds to ensure that the premises are restored to their original condition. A bond, from a commercially recognized bonding company, should be required to be in an amount three times the cost of removing the wiring and restoring the building, as reasonably determined by the

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[33] FNPRM at ¶ 36.

[34] FNPRM at ¶ 48.

MDU owner. The bond should be posted within three days of the incumbent's election to remove the wiring. No work to remove the wiring should be permitted to be commenced until such time as the bond is posted and the 30-day period suggested in Section VIII above has expired. Failure to timely post the bond should result in the incumbent's being deemed to have abandoned all home run and cable home wiring in the building.

X. THE INSIDE WIRE RULES SHOULD APPLY TO ALL MVPD'S

RCN concurs in the Commission's conclusion that its proposed rules for the disposition of home run and cable home wiring should apply to all MVPDs.[35] The goal of the rules is to promote competition, regardless of the identity of the incumbent. RCN additionally agrees that the Commission has the authority to apply its rules to all MVPDs.[36]

XI. ALL HOME RUN WIRING, CABLE HOME WIRING, MOLDINGS AND CONDUITS SHOULD BE TRANSFERRED TO THE MDU OWNER, AT ITS ELECTION, UPON INSTALLATION

RCN supports the Commission's proposal to adopt a rule requiring video providers to transfer to the MDU owner, upon installation, ownership of home wiring and home run wiring, but only to the extent that the owner actually desires to own such wiring. RCN further supports such a transfer of ownership upon installation (again, at the owner's election) of molding and conduits. As the Commission itself stated, "[s]uch a rule might increase competition and consumer choice in future installations by permitting MDU owners to control access . . . from the start."[37]

XII. THE RULES FOR THE DISPOSITION OF HOME RUN WIRING SHOULD APPLY UPON SUBSCRIBER NOTICE OF TERMINATION OF SERVICE

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[35] FNPRM at ¶¶ 39, 74.

[36] FNPRM at ¶¶ 68, 74.

[37] FNPRM at ¶ 47. Where the wiring is already in place, RCN supports the MDU owner acquiring cable home wiring and home run wiring as provided in the Commission's proposed rules with the modifications suggested herein.

RCN agrees with the Commission that the rules for the disposition of home run wiring should be triggered by the subscriber's request for termination of service.[38] RCN submits, further, that the Commission is correct in its assumption that the new provider has every incentive to notify the incumbent about a resident's request to switch service.[39]

XIII. BULK SERVICE CONTRACTS SHOULD NOT SUPERSEDE THE RULES

RCN discourages the Commission from permitting the terms of bulk service agreements to override the rules for the disposition of cable home wiring and home run wiring.[40] Given past history, there is simply too great a risk that incumbents will abuse this provision by writing bulk service agreements that discourage competition *(e.g.*, giving them the right to fill up conduits with concrete before leaving the building). The Commission should not leave such a large and glaring loophole in the rules. Moreover, there is simply no justification for creating this exemption.

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38 FNPRM at 41.

39 FNPRM at ¶ 42.

40 FNPRM at ¶ 76.

CONCLUSION

RCN applauds the Commission in its efforts to bring certainty into this very technical area of the law. For too long, incumbents have been allowed to take advantage of the law's technicalities (that is, its loopholes) to hold onto to their monopoly positions in MDUs and squelch competition. RCN sincerely believes that the Commission's proposed rules, together with the modifications and other proposals outlined herein, will go a long way towards injecting much needed competition into this growing market.

Respectfully Submitted,

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Dated: September 25, 1997